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9 UNITED STATES DISTRICT COURT  
10 EASTERN DISTRICT OF CALIFORNIA

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12 CYTOSPORT, INC.

NO. CIV. S-08-2632 FCD/GGH

13 Plaintiff,

14 v.

MEMORANDUM AND ORDER

15 VITAL PHARMACEUTICALS, INC.,

16 Defendant.

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18 This matter is before the court on defendant Vital  
19 Pharmaceutical, Inc.'s ("VPX") motion to stay the court's order  
20 of May 6, 2009, granting plaintiff CytoSport, Inc. ("CS") a  
21 preliminary injunction enjoining VPX from marketing, selling,  
22 advertising or promoting a ready-to-drink ("RTD") liquid protein  
23 product using the name MUSCLE POWER® or any other trademark  
24 confusingly similar to CS's MUSCLE MILK® trademark or using a  
25 trade dress confusingly similar to the trade dress associated  
26 with MUSCLE MILK. (Mem. & Order, filed May 6, 2009 [Docket #72],  
27 hereinafter "May 6 Order.") VPX moves to stay enforcement of the  
28 preliminary injunction pending resolution of its appeal of the

1 court's order to the Ninth Circuit.<sup>1</sup> VPX filed its notice of  
2 appeal on May 7, 2009. Pursuant to the Ninth Circuit's order of  
3 May 15, 2009, VPX's opening brief is due on or before June 4,  
4 2009; CS's answering brief is due July 2, 2009 or 28 days after  
5 service of the opening brief; and VPX's optional reply is due  
6 within 14 days of service of CS's brief. VPX alternatively moves  
7 this court for a stay of its order pending VPX's motion to the  
8 Ninth Circuit for a stay of the injunction.

9 For the reasons set forth below, the court DENIES VPX's  
10 motion for a stay in its entirety. VPX cannot make the requisite  
11 showing under Federal Rule of Civil Procedure 62(c).

12 Federal Rule of Civil Procedure 62(c) provides that "[w]hile  
13 an appeal is pending from an interlocutory order or final  
14 judgment that grants . . . an injunction, the court may suspend,  
15 modify, restore, or grant an injunction on terms for bond or  
16 other terms that secure the opposing party's rights." In  
17 determining whether to issue a stay pending appeal, the court  
18 must consider: "(1) whether the stay applicant has made a strong  
19 showing that [it] is likely to succeed on the merits; (2) whether  
20 the applicant will be irreparably injured absent a stay;  
21 (3) whether issuance of the stay will substantially injure the  
22 other parties interested in the proceeding; and (4) where the  
23 public interest lies." Cal. Pharmacists Ass'n v. Maxwell-Jolly,

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25 <sup>1</sup> The court granted VPX's application to hear this motion  
26 on shorten time (Docket #85). (Minute Order, filed May 19,  
27 2009.) In light of the extensive briefing on the underlying  
28 motion for a preliminary injunction and considering the lengthy  
hearing held on May 1, 2009, the court found that oral argument  
on the instant motion to stay was unnecessary. (Id.; E.D. Cal.  
L.R. 78-230(h).)

1 --- F.3d ---, No. 09-55365, 2009 WL 975458, at \*1 (9th Cir. Apr.  
2 6, 2009) (citing Humane Soc’y of U.S. v. Gutierrez, 527 F.3d 788,  
3 789-90 (9th Cir. 2008)). This standard presents a continuum.  
4 Golden Gate Rest. Ass’n v. City & County of San Francisco, 512  
5 F.3d 1112, 1119 (9th Cir. 2008). At one end of the continuum, if  
6 there is a “probability” or “strong likelihood” of success on the  
7 merits of the appeal, a relatively low standard of hardship is  
8 sufficient. Id. At the other end, if the balance of hardships  
9 tips sharply in favor of the party seeking the stay, a relatively  
10 low standard of likelihood of success on the merits is  
11 sufficient. Id. Lastly, “where the public interest lies” must  
12 be considered separately from and in addition to whether the  
13 applicant for a stay will be irreparably injured absent a stay.  
14 National Resources Def. Council v. Winter, 502 F.3d 859, 863 (9th  
15 Cir. 2007).

16 Here, VPX’s motion for a stay raises essentially the same  
17 arguments made in its original opposition to CS’s motion for a  
18 preliminary injunction. Particularly, with respect to the merits  
19 of CS’s trademark and trade dress infringement claims, VPX simply  
20 reiterates its prior arguments against a finding of infringement.  
21 While VPX attempts to repackage those arguments herein, by  
22 asserting that the court made certain alleged factual errors,  
23 overlooked pertinent evidence and misapplied controlling legal  
24 standards, its arguments are not compelling.<sup>2</sup> The court

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26 <sup>2</sup> For example, the court disagrees that it made any  
27 factual errors in describing how VPX incorporated critical  
28 elements of CS’s trade dress which, when all the elements are  
considered as a whole, resulted in a product that is confusingly  
similar to CS’s MUSCLE MILK® product. (May 6 Order at 15-20.)  
Moreover, the court did not overlook the various differences in

1 addressed each of VPX's arguments (made then and now) in its May  
2 6 Order, and it need not repeat that analysis here. For the  
3 reasons fully set forth in the May 6 Order, CS demonstrated a  
4 strong likelihood of success on the merits of its infringement  
5 claims against VPX, entitling CS to a preliminary injunction.  
6 (May 6 Order at 13-45.)

7 To overturn the preliminary injunction, VPX must show that  
8 this court abused its discretion in issuing it. Ashcroft v.  
9 ACLU, 542 U.S. 656, 664 (2004) (recognizing that appellate review  
10 of the grant of a preliminary injunction under the abuse of  
11 discretion standard is limited and deferential). This court's  
12 factual determinations, including findings of irreparable harm,  
13 are reviewed for clear error; they will not be overturned "as  
14 long as [the] findings are plausible . . . [considering] the  
15 record viewed in its entirety" and in the light "most favorable  
16 to the prevailing party." Nat'l Wildlife Fed'n v. Nat'l Marine

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18 the products' trade dresses; rather, the court specifically  
19 acknowledged those differences and explained why, under the  
20 controlling law, those differences were not compelling (as for  
21 example, VPX's use of its logo on its product) and why the  
22 similarities in the trade dresses had to be weighed more heavily.  
23 (Id.) Finally, it is not this court, but instead VPX, who  
24 continues to misapply the governing standards. For instance, VPX  
25 continues to point to individual components of the MUSCLE MILK  
26 trade dress to argue that each component serves some useful,  
27 functional purpose. However, as the court's order made clear,  
28 while individual components of a trade dress may serve some  
purpose, it is the particular placement and orientation of those  
components on the MUSLCE MILK packaging that is protectable; in  
assessing functionality, it is the *combination* of the elements as  
a whole which the court must examine. (Id. 41-42.) Similarly,  
contrary to VPX's vigorous protestations, secondary meaning may  
be established through direct and *circumstantial* evidence; here,  
CS proffered substantial circumstantial evidence, namely, its  
extensive marketing and sales of the MUSCLE MILK® RTD product  
since 2004 as well as evidence of actual customer confusion.  
(Id. at 44-45.)

1 Fisheries Serv., 422 F.3d 782, 795 (9th Cir. 2005); Minidoka  
2 Irrigation Dist. v. Dep't of Interior of U.S., 406 F.3d 567, 572  
3 (9th Cir. 2005). Under this standard of review and considering  
4 the strong showing CS made on the merits of its claims against  
5 VPX, VPX cannot demonstrate a probability that it will prevail on  
6 the merits of its appeal.

7 Therefore, in order to obtain a stay, VPX must show that the  
8 balance of hardships tips decidedly in its favor and that the  
9 public interest is better served by issuance of a stay. VPX  
10 likewise cannot make this showing. VPX contends primarily that  
11 it will sustain significant financial losses if the injunction is  
12 not stayed pending its appeal. (See Owoc Decl., *filed under*  
13 *seal*, May 13, 2009 [Docket #83], ¶s 3-5.) However, such  
14 financial harm does not constitute "irreparable" harm for  
15 purposes of an injunction or stay. Sampson v. Murray, 415 U.S.  
16 61, 90 (1974) ("The possibility that adequate compensatory or  
17 other corrective relief will be available at a later date, in the  
18 ordinary course of litigation, weighs heavily against a claim of  
19 irreparable harm.") Moreover, in this case, the court required  
20 CS to post a \$500,000.00 bond to ameliorate the economic losses  
21 that VPX would suffer should CS ultimately not prevail on the  
22 merits of its claims. (May 6 Order at 49.) Finally, VPX  
23 concedes that its appeal will likely be resolved within a matter  
24 of months. If true, VPX's shelf-stable products do not need to  
25 be destroyed and could be later reintroduced into the  
26 marketplace, thus further mitigating any alleged harm.

27 In contrast to the lack of irreparable harm that VPX will  
28 sustain, CS has established that it would suffer *likely*

1 irreparable harm in the absence of an injunction. (May 6 Order  
2 at 47:1, 14.) As set forth in the order and for the reasons  
3 fully stated therein, CS established a "likelihood" that VPX's  
4 continued infringing activities "will cause CS irreparable harm  
5 because these activities prevent CS from controlling the  
6 reputation of its highly recognizable and valuable MUSCLE MILK®  
7 brand," and if VPX's products remain in the marketplace, "it will  
8 be extremely difficult for CS to maintain and restore its  
9 goodwill among customers, some of whom are already being confused  
10 by [VPX's] products." (May 6 Order at 47.)

11 Finally, VPX has not shown that the public interest is  
12 better served by issuance of a stay. VPX contends that the  
13 public is hurt by the injunction because VPX's loyal customers  
14 will be deprived of VPX's product which is a healthier  
15 alternative to MUSCLE MILK®. As support, VPX proffers evidence,  
16 which it did not submit on the original motion, from its various  
17 distributors and retailers who assert that there is no customer  
18 confusion between VPX's and CS's RTD products, and that VPX's  
19 customers should not be deprived of an alternative product to  
20 CS's MUSCLE MILK® product. (Owoc Decl., ¶ 8b., Ex. 1.) CS  
21 rightfully objects to the court's consideration of this evidence  
22 as VPX offers no reason why it was not submitted previously, but  
23 even if the court considers the evidence, it does not establish  
24 that the public interest is better served by issuing a stay. As  
25 set forth in the May 6 Order, numerous competitors of CS offer  
26 RTD protein products which do not infringe CS's trademark and  
27 trade dress. VPX can do the same. To date, however, it has not.  
28 The public interest is best served by preventing continued

1 customer confusion in the marketplace. See e.g. Moroccanoil,  
2 Inc. v. Moroccan Gold, LLC, 590 F. Supp. 2d 1271, 1282 (C.D. Cal.  
3 2009).

4 Therefore, because VPX has not shown that it is likely it  
5 will prevail on its appeal, that the balance of hardships tips  
6 considerably in its favor or that the public interest is best  
7 served by a stay, the court must DENY VPX's instant motion.<sup>3</sup>

8 IT IS SO ORDERED.

9 DATED: May 22, 2009

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12 FRANK C. DAMRELL, JR.  
13 UNITED STATES DISTRICT JUDGE  
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26 <sup>3</sup> As the standard for granting a stay is the same whether  
27 VPX seeks a stay pending final resolution of its appeal or simply  
28 pending it moving the Ninth Circuit to grant a stay, the court  
likewise DENIES VPX's alternative request for a stay pending a  
decision on its intended motion to the Ninth Circuit for a stay  
of the injunction.